IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1354

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

ARISTEDES A. DAY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Trans World Airlines, Inc. ("TWA"), prays for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit entered in these proceedings on December 22, 1975.[1]

Opinions Below

The opinion of the court of appeals appears at pages 3-18 of the separate appendix ("App.") and is reported at 13 Avi. 18,144. The opinion of the district court appears at App. 21-32 and is officially reported at 393 F. Supp. 218.

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[1] Additional respondents are Theodora Day and Constantine Day, in 73 Civ. 4105 (CLB); Kate Kersen, in 74 Civ. 3355 (CLB); and John Spiridakis, Bessie Spiridakis, Leonard Lazarus and Shirley Lazarus, in 74 Civ. 4191 (CLB).

Jurisdiction

The judgments of the court of appeals were entered on December 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the Warsaw Convention,[2] a Treaty of the United States relating to international transportation by air, as modified by the Montreal Agreement,[3] impose absolute liability on an air carrier for injuries to persons inside a terminal building, far removed from the operation of aircraft?

2. In interpreting a multilateral treaty debated and drafted in French, one of the stated purposes of which is to achieve uniformity of law, should a court give great weight to a recent French decision affirmed by the Supreme Court of France interpreting the same phrase of the treaty in issue, as well as to decisions of American courts?

3. Where the legislative history of a treaty drafted in 1929, and redrafted in 1971 with no change in the language in issue, evidences the intent of the parties, may a court frustrate that intent by invoking a policy of its own predilection?

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929. Adherence by the United States was declared June 27, 1934, and became effective October 29, 1934. 49 Stat. 3000; T.S. 876 ("Warsaw Convention", "Convention", or "Treaty").

[3] An agreement of air carriers made with the approval of the Civil Aeronautics Board. C.A.B. Agreement 18900, Order E-23680, May 13, 1966.

Treaty Involved

Article 17, the provision of the Warsaw Convention involved, is set forth in the separate Appendix (App. 1), in both the official French and the U.S. government translation. Article 17 provides:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place *on board the aircraft or in the course of any of the operations of embarking or disembarking*" (emphasis added).

Statement

Respondents sued to recover damages for wrongful death and personal injuries sustained when on August 5, 1973, two Palestinian terrorists, who were not prospective TWA passengers, threw hand grenades and shot at prospective passengers waiting inside the International Transit Lounge of Hellenikon Airport in Athens, Greece. While most of the persons injured were prospective passengers of petitioner TWA, a prospective passenger of at least one other airline was killed and an undetermined number of prospective passengers and employees of other airlines were injured (R-73a, 85).[4]

Respondents had submitted their tickets, checked their baggage and passed through Greek passport inspection. They then descended into the International Transit Lounge where they could patronize a bar or duty-free shops or sit in any part of this large room shared by 40 international

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[4] References preceded by "R" refer to pages of the record contained in the appendix submitted to the Second Circuit.

airlines.[5] No area within the Transit Lounge is reserved for the exclusive use of prospective passengers of any particular airline (R-86). When their flight was called, they lined up in front of Gate 4 to participate in a carry-on baggage and physical search by Greek authorities (R-84). It was at this place in the terminal that the terrorist attack took place.

Had the attack not occurred, respondents would have proceeded through the Greek carry-on baggage and physical search and then walked to a double set of exit doors opening onto a raised terrace. They would have walked out onto the terrace and down a set of stairs onto a roadway at the level of the traffic apron[6] and runway. From there, an Olympic Airways bus would have taken them to the plane, a distance of approximately 250 meters (R-79, 87c). When the bus stopped near the aircraft, respondents would have left the bus, walked to the plane and up the boarding ladder.

Development of the Warsaw Convention

The Warsaw Convention, debated and drafted in French, was written in 1929 and adhered to by the United States in 1934. The purposes of the Convention were to provide uniform rules of recovery for passengers and shippers throughout the world and to limit the liability of air carriers for international transportation. *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323, 327 (5th Cir. 1967), *cert. denied,* 392 U.S. 905 (1968). It created a presumption that the airline was liable, shifting the burden of proof onto the airline to prove freedom from fault, and limited liability to passengers to approximately $8,300.

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[5] The floor plan of the International Transit Lounge, shared by 40 airlines, is set forth in App. 94.

[6] The traffic apron or tarmac is the paved roadway on which aircraft are parked or taxi to the runways.

A diplomatic conference was held at The Hague in 1955 to formally amend the Warsaw Convention. Among other amendments the resulting Hague Protocol raised the limit of liability to $16,600. While the Hague Protocol is in effect in over 45 nations, including Canada, France and the Soviet Union, it was never ratified by the United States.

Dissatisfied with the low limit of liability, the United States formally denounced the Warsaw Convention in 1965 with cancellation to take effect in six months. Prior to the scheduled cancellation date most international airlines entered into the Montreal Agreement which was approved by the Civil Aeronautics Board. The carriers were, of course, aware that they could not change by private agreement the applicability of the Convention, but pursuant to Article 22(1) of the Convention which permitted special agreements of "a higher limit of liability," the airlines agreed to increase the monetary limit to $75,000 and to waive the defense of due care, thereby accepting the concept of absolute liability for accidents falling within the scope of the Treaty. The United States thereupon withdrew its denunciation of the Warsaw Convention which thus continued in all other respects to bind this nation.

The latest development of the Warsaw Convention is the Guatemala Protocol of 1971. Representatives of 55 countries formally amended the Warsaw Convention and the Hague Protocol. They adopted from the Montreal Agreement the concept of absolute liability, raised the limit of liability to $100,000, and added an escalator clause. In addition, a Supplemental Compensation Plan of an additional $200,000 was added allowing for recovery, in absolute liability, for a total of $300,000 per passenger. The drafters of the Guatemala Protocol did make changes to the language of Article 17 of the Warsaw Convention, but they kept the identical phrase at issue here, "any of the operations of embarking or disembarking" (Lowenfeld, Aviation Law § 6.2, and Documents Supplement,

p. 438 (1972)). The Guatemala Protocol has been signed by the United States and the Executive plans to send it to the Senate for their advice and consent. The interpretation of this clause of the Treaty, therefore, is timely and important.

The Proceedings Below

Respondents brought their actions in the United States District Court for the Southern District of New York invoking the federal question and/or diversity jurisdiction of the court. 28 U.S.C. §§ 1331, 1332. The complaints alleged that TWA was negligent and, alternatively, that TWA was absolutely liable, regardless of fault, pursuant to the Convention as modified by the Montreal Agreement. Moving for partial summary judgment on the issue of absolute liability, respondents claimed that TWA was absolutely liable for their injuries even though they were still inside of the Greek government owned and operated terminal building at the time of the terrorist attack (R-82).

TWA also moved for partial summary judgment.[7] TWA cited the legislative history of the treaty including the minutes, the later stated views of three delegates to the convention, as well as the writings of many other authorities in the field. Domestic and foreign cases were cited including one directly in point affirmed by the highest court in France, *Maché* v. *Air France* (App. 59-64).

The district court held, however, that "the plain meaning of the words in the course of any of the operations of embarking produces a single conclusion" (393 F. Supp. at 221, App. 27). It candidly based its decision on its own

[7] The motions for partial summary judgment were confined to the scope of Article 17 of the Warsaw Convention. Plaintiffs' claims in negligence were not involved.

economic philosophy that the costs of this terrorist incident could best be borne by the airline, particularly since the carrier could buy insurance (App. 25). The district court "readily" distinguished the American precedents as involving disembarking as opposed to embarking, and did not mention the *Maché* case (App. 30). It issued a certificate pursuant to 28 U.S.C. § 1292(b), and an interlocutory appeal followed.

While the certified appeal in *Day* was pending in New York, the United States District Court for the Western District of Pennsylvania decided *Evangelinos* v. *Trans World Airlines, Inc.*, 396 F. Supp. 95 (W.D. Pa. 1975) (App. 33-49). *Evangelinos* arose out of the same terrorist incident as *Day* and was decided on substantially similar papers. Judge Snyder, in *Evangelinos*, discussing the district court's opinion in *Day* stated:

> "The great difficulty with Judge Brieant's opinion . . . is that it extends the liability of the signatories to the Montreal Agreement under the Warsaw Convention far beyond anything that was within the contemplation of the parties. This the Court does not feel justified in doing" (396 F. Supp. at 192, App. 46-47).

Without mentioning *Evangelinos*, which was briefed and argued on the appeal, the United States Court of Appeals for the Second Circuit affirmed the district court's order in *Day*. While paying lip service to a court's duty to " 'give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties' " (App. 12), its decision was, in fact, based on the "deep pocket" theory, finding that TWA could more easily bear the expenses of the "accident." It found that its construction was "in harmony with modern theories of accident cost allocation" (App. 9). The court of appeals did not refer to *Maché*, affirmed by the Supreme Court of

France. Although it found the Montreal Agreement of 1966 (App. 13) and the Guatemala Protocol of 1971 (App. 15, n. 15) significant, the court of appeals did not discuss the fact that the Guatemala Protocol made no change in the language of Article 17 at issue here.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions of the First Circuit Court of Appeals and the Supreme Court of France.

The "Warsaw Convention is by far the most widely adopted treaty concerning private international law and after the United Nations Charter one of the most widely adopted of all treaties . . ." (Lowenfeld, Aviation Law § 4.1). As Judge Wisdom described the Convention, it is "rather like a 'uniform law' within the United States. The Court has an obligation to keep interpretation as uniform as possible" (*Block* v. *Compagnie Nationale Air France,* 386 F.2d 323, 337-38 (5th Cir. 1967), *cert. denied,* 392 U.S. 905 (1968)). It should be given its "'proper status as a treaty obligation of our nation without equivocation'" (*Smith* v. *Canadian Pacific Airways, Ltd.,* 452 F.2d 798, 801 (2d Cir. 1971)).

Chief Judge Kaufman's decision in *Day* is substantially in conflict with the decision of the First Circuit in *MacDonald* v. *Air Canada,* 439 F.2d 1402 (1st Cir. 1971); in direct conflict with the decision of the French Supreme Court in *Maché* v. *Air France* (App. 59-64) and the decision of Judge Gignoux, *In Re Tel Aviv* (D.P.R. 1975) (App. 50-57); and indistinguishably in conflict with *Evangelinos* v. *Trans World Airlines, Inc.,* 396 F.Supp. 95 (W.D. Pa. 1975) (App. 33-49), which arose out of the same terrorist incident as *Day* and which was decided on substantially similar papers. Oral argument was heard by

the Third Circuit in *Evangelinos* on February 3, 1976, and the parties are awaiting a decision.[8]

In *MacDonald* v. *Air Canada,* 439 F.2d 1402 (1st Cir. 1971), the plaintiff had mysteriously fallen inside the terminal building after getting off her plane but before her daughter had picked up their baggage or before they had gone through customs. Chief Judge Aldrich held that any of the operations of disembarking has

> "terminated by the time the passenger has descended from the plane by the use of whatever mechanical means have been supplied and has reached a safe point inside the terminal . . ." (439 F.2d at 1405).

In addition, Chief Judge Kaufman's decision in *Day* is directly in conflict with *Maché* v. *Air France*[9] affirmed by the Supreme Court of France. In *Maché,* plaintiff was being led by two Air France stewardesses from the plane to the terminal building. They crossed the traffic apron and continued on to an area called the customs garden on

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[8] Other decisions in conflict with that of Judge Kaufman are: *Fclismina* v. *Trans World Airlines, Inc.,* 13 Avi. 17,145 (S.D.N.Y. 1974) (App. 58) (Embarking or disembarking terminates when a passenger walks through an expandable, horizontal jetway which leads from the airplane door to the terminal proper); *Klein* v. *KLM Royal Dutch Airlines,* 46 App. Div.2d 679, 360 N.Y.S.2d 60 (2d Dep't 1974) (Embarking or disembarking terminates when a passenger "arrives safely within the terminal . . .").

[9] *Maché* v. *Air France,* [1967] Revue Française de Droit Aérien 343 (Cour d'Appel de Rouen 1967), *aff'd,* [1970] Revue Française de Droit Aérien 311 (Cour de Cassation 1970). The trial court had held the Warsaw Convention applied, [1961] Revue Française de Droit Aérien 283 (Tribunal de Grande Instance de la Seine 1961). The Court of Appeals of Paris affirmed, [1963] Revue Française de Droit Aérien 353 (1963); the Court of Cassation, France's highest court, reversed and remanded to a different court of appeals as is their custom, [1966] Revue Française de Droit Aérien 228 (Cour de Cassation 1966). The Court of Appeals of Rouen, sitting *en banc,* rendered the decision discussed above which was then affirmed by the Court of Cassation in 1970.

their way to the terminal building. Before reaching the terminal building plaintiff was injured. Examining the *travaux préparatoires,* or legislative history, of this treaty debated and drafted in French, the Court of Appeals of Rouen held that the Warsaw Convention applies to accidents on the ground during operations of embarking or disembarking "only to the extent that these operations are taking place on the traffic apron . . ." (App. 62). On appeal the French Supreme Court affirmed. Once a passenger leaves the traffic apron, even though he has not yet entered the terminal building and even though he is being led by two Air France stewardesses, he has completed the operations of embarking or disembarking.[10]

Where uniformity of international law is a primary purpose of a multilateral treaty[11] a court should give great

[10] See also a lower court decision, *Forsius* v. *Air France,* [1973] Revue Française de Droit Aérien 216 (Tribunal de Grande Instance de Paris 1973) (App. 65-67) where plaintiff, just like respondents, was injured in the International Transit Lounge of Orly Airport after checking in and having passed through customs. The court held that she had not yet commenced any of the operations of embarking. But see *Blumenfeld* v. *BEA,* [1962] Z. Luft. R. 78 (Berlin Court of Appeals 1961) (App. 68-72), where plaintiff was injured outside of the terminal building on steps leading from the terminal to the traffic apron. The court held Warsaw applied but in *dicta* stated that "the air carrier already commits the flight passengers under his care when he requests them to go from the waiting room to the aircraft. . . . As there exists no absolute liability to the disadvantage of the air carrier according to the law, it cannot be unequitable to interpret the notion of 'embarking' in an expansive sense" (App. 70). In the case at bar, TWA is absolutely liable and so even on the basis of the German lower court's decision, Warsaw would not apply.

[11] That uniformity of international air law was the intention of the drafters of the Warsaw Convention cannot be denied. The minutes of the Convention are replete with statements of the various framers describing this goal. Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw (R. Horner & D. Legrez transl. 1975) ("Warsaw Minutes").

(footnote continued on following page)

weight to interpretations of the highest courts of other adherents. See *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.,* 291 U.S. 138 (1934), where this Court looked to the interpretation of a treaty given by the Supreme Court of Canada.

The *Day* decision directly conflicts with recent decisions interpreting the identical legislative history in the context of terrorist incidents. On December 9, 1975, Judge Edward Gignoux, sitting in the District of Puerto Rico, decided *In Re Tel Aviv* (App. 50-57). The plaintiffs in that case flew into Lod Airport, Israel, descended the movable stairs and then walked or rode a bus to the terminal. Passing through Immigration they were in the baggage area awaiting the arrival of their baggage when two Japanese terrorists in the service of a Palestinian terrorist organization opened fire with hand grenades and submachine guns.

(footnote continued from preceding page)

Sir Alfred Dennis of Great Britain stated: "As regards the British Government, the sole reason which it has for entering into this Convention is the desire to achieve uniformity" (Warsaw Minutes at 35). "The draft of the Convention is contrary, on several points, to our laws and to our customs, but we have decided to make sacrifices to obtain this uniformity" (Warsaw Minutes at 35-36). Mr. Pittard of Switzerland stated: "That which we want to obtain is the harmony of laws" (Warsaw Minutes at 87). Mr. Ripert of France pointed out that "[w]e want to arrive at a unity of law in the interest of commercial transport" (Warsaw Minutes at 87). It was only in certain specified areas, where the use of local laws was specifically authorized, such as standing to sue and venue, Articles 21, 24(2), 25(1), 28(2) and 29(2), that the Convention allows any deviation from the rule of uniformity. In each such instance, however, specific reference is made authorizing the use of national law (Warsaw Minutes at 208-212). See Secretary of State Hull's letter to the President, recommending adherence to the Convention ([1934] U.S. Aviation Reports at 243). The Convention represents the only "widespread substantive achievement in the unification of private law by international agreement" (Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497 (1967). See also *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323, 337-38 (5th Cir. 1967), *cert. denied,* 392 U.S. 905 (1968). No nation should put itself above this international rule of law.

"From the time the passengers stepped out onto the movable stairs leading from the plane, all the facilities they used were owned and operated by the State of Israel or El Al, the Israeli National Airline, not by Air France" (App. 51). The *Tel Aviv* passengers' path, therefore, was precisely the same as respondents' in reverse. In Athens, all the facilities which respondents were using or would have used, the Athens terminal and the Olympic Airways bus, were owned and operated by the Greek government or Olympic Airways (R 82). Discussing the legislative history of the Warsaw Convention as well as the district court decisions in *Day* and *Evangelinos,* Judge Gignoux concluded:

> "The legislative history, however, makes clear that in drafting Article 17 the delegates to the Convention specifically intended to exclude from coverage accidents occurring to passengers inside an airport terminal building" (App. 54).[12]

The interpretation of the same treaty language has been or will be decided by three different circuits as well as by a number of foreign courts including the Supreme Court of France. The French Supreme Court has affirmed *Maché* which was decided in 1967. The First Circuit decided *MacDonald* in 1971 and will soon deal with the question again when it decides the interlocutory appeal from Judge Gignoux's decision, *In Re Tel Aviv.* In *Day,* the case at bar, the Second Circuit conflicted with the First and with the overwhelming worldwide authority on point. The Third Circuit heard oral argument in an identical case, *Evangelinos,* on February 3, 1976. Where uniformity of law is the purpose of the treaty, the departure of the Second Circuit from the previously established interpretation of the treaty language should not go uncorrected, if only to prevent inconsistent decisions within the United States.

[12] Judge Kaufman came to a very different conclusion from his review of the Warsaw Minutes.

II. The Decision Below Interjects Considerations Not Proper to Treaty Interpretation and Ignores the Intent of the Drafters.

The decision of the court below was in large part based on the court's own economic theories of accident cost allocation including the airline's ability to pay and spread the risk (App. 9-10). Such interpretation ignores the duty of courts to look " 'within the four corners of the Treaty' keeping in mind the purpose of the contracting parties." *American Trust Co.* v. *Smyth,* 247 F.2d 149, 153 (9th Cir. 1957). It is not the function of a court to change a treaty which it dislikes by the interjection of concepts foreign to the treaty. *The Amiable Isabella,* 19 U.S. [6 Wheat.] 1, 7 (1821).[13]

Rather the court must fully examine the legislative history of the treaty to ascertain the intent of the parties. *Choctaw Nation* v. *United States,* 318 U.S. 423, 431-32 (1943); *Factor* v. *Laubenheimer,* 290 U.S. 276, 294-95 (1933).

The Warsaw Minutes

The draft article presented to the delegates at Warsaw in 1929 would have extended liability "from the moment when travelers, goods or baggage enter in the aerodrome of departure to the moment when they leave the aerodrome of destination . . ." (Warsaw Minutes at 264). It became evident that the draft article would have to be split and that passengers would have to be treated differently from goods and baggage. Mr. Peçanha, the

[13] In a prior Second Circuit decision involving the Warsaw Convention the dissenting judge stated: "The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it" (*Lisi* v. *Alitalia-Linee Aeree Italiane, S. p. A.,* 370 F.2d 508, 515 (2d Cir. 1966), *aff'd by an equally divided court,* 390 U.S. 455 (1968)).

Brazilian delegate, asked "Can one make the carrier liable for the life of the passenger before he has boarded the aircraft? How many accidents can occur within the boundaries of the aerodrome before the departure takes place?" (Warsaw Minutes at 71, App. 78).

Mr. Sabanin, a delegate of the U.S.S.R., asked:

> "If a passenger is injured in the aerodrome before entering the aircraft, for example, while he is in the restaurant of the aerodrome, it does not seem logical . . . to say that the carrier would be liable. I admit that the proposal of the Delegation from Brazil is more explicit and better drawn than ours" (Warsaw Minutes at 72, App. 79).

The Italian delegate, Mr. Ambrosini, stated:

> "In sum, it is necessary, in my opinion, to have expressly in mind the case of a passenger killed or wounded by a third party in an aerodrome, because this case is not provided for in the present text.
>
> "I will add that should the conference adopt the proposal of the Delegation from Brazil, things will become much easier, because, according to this proposal, the system of liability of the Convention applies only when the passenger is on board the aircraft" (Warsaw Minutes at 70-71, App. 77-78).

The Brazilian delegate summarized the positions:

> "I draw the attention of the Assembly to that upon which we are going to vote. It's a question of saying, whether the liability of the carrier begins as soon as the traveler enters into the aerodrome, which is a public place, or when he embarks on the aircraft" (Warsaw Minutes at 82, App. 89).

The Brazilian proposal was accepted by the delegates and the article was sent back to the drafting committee

from which the present language emerged and was adopted (Warsaw Minutes at 82-83, 205-206, App. 89-90, 92-93).[14]

Subsequent Discussion of Article 17

Subsequent discussion at the Fifth International Congress on Air Navigation held at The Hague in 1930, only one year after the Convention was drafted, evidences beyond doubt that the drafters never intended the Convention to apply to passengers inside an air terminal. The debate concerned the precise meaning of the words "any of the operations of embarking or disembarking." The disagreement, however, centered only on whether Article 17 included only a passenger's actual climbing into or out of the aircraft or whether it also extended to accidents taking place out on the traffic apron. D. Goedhuis, later president of the Hague Convention, presented the two views:

> "Further, art. 17 mentions 'embarquement' and 'débarquement'. The question is how to explain these words? There are two views viz: *a*) in a broad sense: i.e. the embarking begins when the passenger leaves the station-building on his way to the aeroplane, standing in the flying-field; the disembarking ends when the passenger, arrived at destination, enters the station-building; *b*) in a narrow sense, i.e.: the getting on board and the alightment only comprise the actual getting in and out of the aeroplane."[15]

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[14] The adopted Article 18(2) holds a carrier liable for damage to baggage or goods from "the period during which the baggage or goods are found in the custody of the carrier, whether in an airport or on board an aircraft . . ." (App. 93). Article 17, however, was specifically drafted to reflect the more limited application of the treaty to passengers, with the words "operations of" apparently being added in response to the question raised by Mr. DeVos with regard to someone actually on the boarding ladder of the aircraft (App. 88).

[15] Goedhuis, *Observations Concerning Chapter 3 of the Convention of Warschau 1929, Cinquième Congrès International de la Navigation Aérienne,* 1-6 Septembre 1930 (1931) at 1163-4.

Mr. Goedhuis also explained that the drafters inserted the phrase "any of the operations of" to insure that the Convention would cover a trip involving more than one stop.

> "[T]he minutes of the meetings of the C.I.T.E.J.A. bring out that one did not want to consider only embarking or disembarking at the aerodrome of departure and of destination, but also the operation during a stop *en cours de route*. For that reason 'during *any* operations' was used in article 17." (Goedhuis, *National Airlegislations and the Warsaw Convention*, p. 196 (1937)).

The broadest possible interpretation one can legitimately give to Article 17, therefore, is one which would extend the period of liability to include those accidents occurring out on the traffic apron after the passenger has left the terminal building. In any event, this Court is not asked to make a choice here between the "broad" or "narrow" interpretation of Article 17. Under *either* interpretation, the airport buildings are excluded from coverage under Warsaw, as was the expressed intention of the Convention's drafters.

The overwhelming authority evidencing the intent of the parties to have local law rather than the Warsaw Convention govern accidents occurring inside airport buildings includes a statement by Mr. Giannini, the Italian delegate to the Warsaw Convention, that the "grave and unjustifiable rule . . . to have liability commence at the moment of entry into or exit from, respectively, the airport of departure or arrival, is eliminated" (Giannini, *Saggi di Diritto Aeronautico*, p. 233 (1932)). Dr. Otto Riese, German delegate to the Warsaw Convention stated unequivocally that the Convention excludes those accidents having

taken place while the passenger "is in the airport terminal buildings."[16]

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[16] Riese and Lacour, Précis de Droit Aérien, p. 265 (1951). *See* Goedhuis, National Airlegislations and the Warsaw Convention, p. 193 (1937) ("when the passenger goes from the airport buildings to the aircraft on the tarmac [traffic apron]"); Van Houtte, La Responsabilité Civile dans les Transports Aériens, Intérieurs et Internationaux, p. 80 (1940) ("goes out on the runway to get to his plane or embark on it"); Lemoine, Traité de Droit Aérien, p. 540 (1947) ("from the time when the passenger goes out onto the departure apron"); Lureau, La Responsabilité du Transporteur Aérien, p. 90 (1961) ("from the time when the passenger leaves the terminal building of the airport"); Bonet Correa, La Responsabilidad en el Derecho Aereo, p. 68 (1963) ("the period of air carriage begins when the traveller steps onto the runway"); Milde, The Problems of Liabilities in International Carriage by Air, p. 57 (1963) ("when the passenger . . . leaves the airport building"); H. Drion, Limitation of Liabilities in International Air Law, p. 83 (1954) ("from the final gate to the aircraft and vice versa").

See also de Juglart, Traité Elémentaire du Droit Aérien, p. 330 (1952) ("the language of Article 17 by itself does not precisely define what is meant by 'operations of embarking or disembarking.'"); Heller, Notes on the Proposed Revision of Article 17 of the Warsaw Convention, 20 Int'l & Comp. L. Q. 142, 146 (1971) ("it would seem advisable to define clearly and unequivocally when and where embarkation begins and disembarkation ends." Mr. Heller suggests that the Guatemala Protocol draft be amended so that "[t]he rule of absolute liability would then apply only . . . on board an aircraft in flight."); and Shawcross and Beaumont on Air Law, pp. 441-442 (3rd ed. 1966) ("the exact meaning . . . is a question of some difficulty. Clearly the phrase includes the time during which the passenger is ascending or descending the steps of the aircraft. However, the words 'In the course of *any* of the operations' of embarking or disembarking appear to envision a wider period of liability and probably include the time during which the passenger's movements are under the control of the carrier for the purpose of embarking and disembarking."

But see Matte, Traité de Droit Aérien-Aéronautique, p. 405 (1964), where, citing the dicta in *Blumenfeld* and the 1961 trial court decision in *Maché* which was later reversed, Matte states his view that embarking commences "from the time when the passengers are taken in charge by the employees of the airline to be led to the plane."

Paul Chauveau, Honorary Dean and Professor of Law at the University of Bordeaux, has also addressed the question of when liability attaches under Article 17 and has specifically stated that the terminal building was excluded by the drafters of the Convention:

> "The period during which the passenger is in the buildings of the airport was eliminated . . ." (Note by P. Chauveau [1968], D. S. Jur. 517.)

Dean Chauveau has also noted that

> "In the case of conventions such as that of Warsaw whose purpose is to formulate uniform international rules, one cannot justify a free interpretation which judges of the so-called scientific school permit themselves in the application of internal law. A stricter interpretation, more or less exegetic, following the words of the text and the common intention of the high contracting parties, is called for." (Note by P. Chauveau, D. S. Jur. 82 (1970), J.C.P. II 16353) (Cass. Crim.)).

The recitation of this long line of authority is necessary due to the conclusion of the court below that the legislative history and subsequent development supported its conclusion (App. 11). The failure of courts to apply proper rules of interpretation, as did the court below, can only result in the frustration of the purposes of all treaties. In accordance with Article 41 of the Warsaw Convention, delegates met at The Hague in 1955 and in Guatemala in 1971 and officially made changes in the Treaty. In both instances, although other provisions of the Treaty were changed, the scope of the Treaty, as expressed in Article 17, was not. The court below, however, substituted its own notions of policy for the expressed intent of the over 100 signatory states.

III. This Case Involves Important Issues of Treaty Interpretation Requiring Resolution by this Court.

Since vast numbers of people travel on international flights each day, it is important that both the traveling public and the airlines be given uniform guidance as to the applicability of this Treaty. The decision below, conflicting with the drafters' intent and prior judicial precedent, has the effect of unilaterally amending the Treaty so that it would now apply to persons inside the airport buildings. The compelling need for this Court to exercise its certiorari jurisdiction in a case such as this is self-evident.

That the issues presented by this case are of widespread concern is demonstrated by substantial litigation involving the identical issues in at least twelve other pending cases.[17]

Furthermore, this issue will have continuing significance since the Guatemala Protocol, which will amend certain provisions of the Warsaw Convention, contains the identical language at issue here.

If extending the concept of absolute liability to a situation which the adhering States specifically excluded be "in harmony with modern theories of accident cost allocation," then it is for the adhering States, not the court below, to change the Treaty, which as recently as 1971 these States chose not to do.

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[17] There are six cases in the Southern District of New York, two in the New York State courts, two in the District of New Jersey, and two in the Western District of Pennsylvania. Additionally, a multi-districted action, *In Re Tel Aviv*, involves approximately 48 cases of which three are being brought under the absolute liability provisions of the Convention.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 1976

Certificate of Service.

JOHN N. ROMANS, an attorney for petitioner and a member of the Bar of this Court certifies that on March 19, 1976, three copies of the foregoing Petition for a Writ of Certiorari and separate Appendix were served by mail upon all parties required to be served as follows:

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